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COMPARATIVE ASPECTS OF CHINESE AND VIETNAMESE TRADE LAW

by

Rosario J. Girasa*

Beginnings

The grand experiment in marxist ideology, which began in 1917 in the former Soviet Union and spread to China in 1949, did not succeed. As market economies flourished in the West, particularly in Germany, and in the East in Japan, it became clear to the leadership of the communist states that existing economic modus operandi would cause continuing decline within their countries. As a result, significant changes had to take place. Refusing to acknowledge that their ideological underpinnings were failures, China's and other communist leaders employed the ruse that they sought to provide a unique combination of marxist and capitalist thought and practices to better serve their constituencies. We will summarily review the statutory enactments which incorporated the changes to a market economy in China. Vietnam did so a decade later. The thesis of this paper is that Vietnam utilized China's experience by copying those enactments which were successful. In doing so, it also is becoming a market economy which will make it a major player in Asia within the next decade.

The transition to a market economy in the People's Republic of China encompassed considerable preparation and planning in untested waters for a Communist society. By the events which followed, it was clear that a complete overhaul of the legal system had to co-exist with the economic statutory enactments. Accordingly, in a dramatic manner, a series of measures were adopted at the Second Session of the Fifth National People's Congress on July 1, 1979. The result was analogous to some extent to the U.S. Constitutional Convention which created the tri-partite system of government in Articles I, II and III of the Constitution. The remarkable success of these measures were to greatly influence a similar transition in Vietnam a decade later.

The first measure, Order No. 1, was the passage of the Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China.¹ It established people's congresses and governments at the local level in provinces, autonomous regions, municipalities, counties, municipal districts and towns.² By doing so, power was disbursed to centers away from the central government in Beijing.

The second Order was the passage of the Electoral Law of the National People's Congress and Local People's Congresses of the People's Republic of China.³ It sets forth the procedures for voting at local and national levels, election of deputies to local and national people's congresses, registration and nomination of candidates and election procedures. Although in practice its procedures would not allow for significant opposition to governmental policies, nevertheless, the basis for democratic reform is statutorily present.

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The third order, the Organic Law of the People's Republic of China,⁴ reformed the courts which heretofore made a mockery of procedural and substantive rights of parties before them. Unless a judicial system to which adjudication of disputes could be referred was in place, it was highly likely that foreign business enterprises would have demurred in investing significant resources. Thus, the statute created a western-like tripartite system of courts. There are three types of courts: local courts, special people's courts and the Supreme People's courts. The local people's courts has three levels: the basic people's courts, intermediate people's courts and higher people's courts. Special courts exist for military matters, railway transport, water transport and other focused areas including, most recently, courts considering intellectual property matters.

The remaining statutes passed on the same momentous day were major revisions in the criminal sphere. Order No. 4 is the Organic Law of the People's Procuratorates of the People's Republic of China⁵ which, in effect, created a prosecutorial office for investigations, initiation and carrying out of judgments with respect to criminal activities. A formalized penal code was enacted as Order No. 6 entitled: Criminal Law of the People's Republic of China.⁶ It sets forth the crimes and nature of punishment, including the death penalty for the "most heinous crimes." Order No. 7 is the Criminal Procedure Law of the People's Republic of China,⁷ which lays out the methodology for filing of criminal charges, investigation and initiation of a public prosecution. Procedures are also stated for conduct of trials and appeals.

Having created a legal infrastructure including a revision of the Constitution⁸ incorporating the statutory changes, China enacted the most important law relevant to our discussion, namely, the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures.⁹ Unlike the other statutes enacted on July 1, 1979, this statute was made almost immediately effective (July 8, 1979 rather than January 1, 1980). The statute, though consisting of only 4 pages (15 articles), became the cornerstone of China's entry into western economic mode of doing business. Considering the previous xenophobic governmental attitude towards foreign investments, the law was an extraordinary opening to the outside world.

Article 1 of the Joint Venture statute stated the purpose of the legislation which is to expand international economic cooperation and technological exchange. The Regulations elaborate the law's overall purpose. Article 3 of the Regulations provide that the joint ventures are to raise the scientific and technological standards of China by establishing business in six primary areas, to wit: (1) energy resources development, construction materials, chemical and metallurgical industries; (2) machine-building instruments, meter industries and off-shore oil-mining facilities; (3) electronics, computers and communications equipment manufacturing; (4) light industries, textiles, food, pharmaceutical, medical and packaging industries; (5) agriculture; and (6) tourism.

Vietnam's commencement into the global marketplace began 7½ years after China's foray by the enactment of the Law on Foreign Investment in Vietnam.¹⁰ It is an expanded copy of China's legislation. Both have almost identical preambles. China's law begins: "With a view to expanding international cooperation..." Vietnam similarly commences with: "In order to expand economic co-operation with foreign countries..."¹¹ Both laws immediately disavow past

communist ideological mainstays which held that expropriation and/or nationalization of foreign-owned property in compensable only to the extent voluntarily permitted by the host country.¹² Article 2 of China's law states: "The Chinese Government shall protect, in accordance with the law, the investment of foreign joint ventures, the profits due them and their other lawful rights and interests..." Article 1 of Vietnam's law similarly provides: "The State of Vietnam guarantees the ownership of invested capital and other rights of foreign organizations and individuals..." Vietnam recites in its statute a similar wish list of desired projects for investment as China's list recited above.¹³

The major difference between the two statutes is that Vietnam recites three forms of legal enterprises which a foreign investor may become engaged, namely, contractual business co-operation, joint venture and wholly owned enterprises, whereas China began solely with the joint venture as its primary mode of foreign investment. China gradually became more receptive to foreign investment by permitting a variety of methods of doing business in China.

The six basic forms of business enterprises within China are: (1) representative offices. These offices represent other offices of a multi-national company. They may engage in sales and purchases, bargain with local and state governments and enterprises, engage in market studies and collect information. They may not engage directly in business activities (execute contracts and the like); (2) processing and assembling operations. Companies in foreign countries ship raw materials and parts to China where they are assembled and exported; (3) technology transfer. The foreign party licenses its technology which is protected by intellectual property statutes and regulations (patents, trademarks, copyrights, property technology (know-how) and computer software); (4) equity joint ventures; (5) cooperative joint ventures which is similar to equity joint ventures with exceptions such as a variable profit-distribution. It is most used in hotel management; and (6) wholly foreign-owned enterprises.

Joint Ventures

In China, the joint venture must satisfy at least one of the following requirements: (1) adopt advanced technology, equipment and scientific techniques, increase variety and quality of output of products and conserve energy and materials; (2) benefit technical renovation of the venture and achieve quick results and large profit with small investment; (3) expand exports and increase foreign exchange earnings; and (4) train technical or managerial personnel.¹⁴ Vietnam does not define the type of projects a joint venture may operate but inasmuch as the government has to approve the projects, the result may be similar. One should not lose sight of governmental flexibility as well as intransigence. If Vietnam or China desires particular industries, approvals are readily available. If projects have questionable value, then such approvals may become mired with the bureaucracy.

Establishment

The joint venture with the Chinese enterprise must take place within the PRC.¹⁵ The agreement must be in writing, which agreement, together with the articles of association and other relevant documents, are to be examined and approved by the Ministry of Foreign

Economic Relations with Trade of the People's Republic of China (MOFERT). Once it approves the joint venture, it then authorizes the local or regional authorities under the State Council to examine and permit the joint venture. Application for permission to establish a joint venture consists of three basic documents: the joint venture agreement (document in which the parties consent to the establishment of a joint venture and states the basic principles for its establishment; the joint venture contract (document setting forth the rights and obligations of the parties); and the articles of association (similar to U.S. certificate of incorporation and by-law-names, registered capital, composition of Board of Directors etc.).¹⁶

In Vietnam, the key document is the joint venture contract between the Vietnamese and foreign parties. Application is made to the State Committee for Co-operation and Investment. The application includes submission of the joint venture contract, a feasibility study, the charter of the enterprise and petition for preferential treatment, if any.¹⁷

In both countries, the joint venture contract requirements are almost identical, thus further illustrating the thesis of this writer that Vietnam copied China's laws and regulations, adopting those parts which proved successful in transforming the latter's economy. The wording of the later Vietnamese regulations is virtually the same.¹⁸

Status and Capitalization

The joint venture in both countries is a "limited liability company."¹⁹ Its precise meaning in China is not found in either its statute or regulations but may be gleaned from other parts of the legislation. The statute and regulations do state that the liabilities of the parties are limited to the amount of investment each party has undertaken in the joint venture. The 1979 statute mandated that the foreign party must invest not less than 25% of the registered capital of the joint venture. Most joint ventures invest at least 51% of the capital. Profits and losses are to be divided in proportion to their contribution to the "registered capital."²⁰ The registered capital which is similar to "stated capital" in the U.S., is the total amount registered with the government agency when the joint venture was established and is the sum of the investment by all parties.²¹ The joint venture may not diminish the registered capital but may increase or assign it provided that the Board of Directors and governmental authorities approve.²² If a party wishes to assign its interest, governmental approval will be necessary and is subject to the right of first refusal by the other party to the joint venture.²³ The difficulty of the joint venture having a strictly Chinese personam is its lack of ability to branch out beyond the national boundaries. It appears, however, that MOFERT may approve a branch office of the joint venture outside of China.²⁴

Vietnam similarly provides that the joint venture enterprise by a limited liability company which is one wherein "the liability of each party to the other parties and to the joint venture enterprise being limited to its capital contribution to the prescribed capital."²⁵ The enterprise's Board of Management is in charge of the venture. In a footnote to its statute, the Board of Management is stated to be equivalent to a Board of Directors but "management" is the preferred terminology because allegedly "Vietnam regards the Vietnamese members of the board as yet not having the directorship skills required for the board properly to be called a board of directors."²⁶

Vietnam's statute provides that the minimum contribution of the foreign party is 30% of the total prescribed capital and further states that there is no ceiling to the proportion of the contribution by the foreign party to the prescribed capital.²⁷ Unlike China, all assets of the joint venture must be insured. The parties share risks and losses in proportion to their respective contributions to the capital.²⁸

Capitalization

China's statute states that the investment in a joint venture may be in cash, buildings, plant equipment, machinery, international property rights, technology or right to use a site. The parties are to fix the value of the investment in a fair and reasonable manner.²⁹ Vietnam's law is almost identical.³⁰ Foreign currency in China must be converted to renminbi at the foreign exchange rate set by the State Administration of Exchange Control. The rate tends to be considerably lower than the black market exchange rates, although the currency may be exchanged into foreign currency at the same governmental rate.³¹ Vietnam does not have the dual system of currency. It does mandate, however, that the parties agree in advance the proportion of products to be sold both abroad and within the country. All foreign currency received from export sales must, at the least, be sufficient to meet the foreign currency requirements of the joint venture.³²

The right to use a site in China must be compensated either as a credit to the Chinese party as a part of its investment or to the government.³³ The regulations are obviously tipped greatly in favor of the Chinese party. For example, if machinery, equipment or other materials are contributed by the foreign party, they must (1) be indispensable to the joint venture; (2) made in China unless shown that the price, quality or delivery time would not satisfy the joint venture's requirements; and (3) their fixed value may not exceed their current international market price for the equipment. The Chinese party is not bound by the provisions.³⁴ Vietnam does not address this issue in its law or regulations.

Management

The Board of Directors of a joint venture in China determines all major questions arising with respect to its operation. The board consists of at least three members. The number of directors is determined by the parties who are to take into account the ratio of the investment by each party. The chairman must be the Chinese party and the vice-chairman (vice-chairmen) is the foreign investor. The term of office is four years (Vietnam-maximum of 5 years) which term is renewable.³⁵ At least one annual meeting is mandatory, which meeting is presided over by the chairman, or vice-chairman if the former is not available (Vietnam concurs). At least two-thirds of the Board must be present, although a board member may give a proxy to act in his/her behalf (Vietnam is the same). Interim board meetings must be called at the request of one-third of the board members. The meeting is held at the official address of the joint venture.³⁶

In Vietnam, the parties to the joint venture appoint members to the board of management in proportion to their contribution to capital, although each party must have at least two representatives on the board. The chairman is to be selected by agreement of the

parties. The general director and deputy general director (officers) are appointed by the board. One of the directors must be a Vietnamese citizen.³⁷ China takes the more traditional approach by providing that the day-to-day operations are to be conducted by the officers named by the board of directors. The duties of the president include promulgation of the resolutions of the board, representation of the joint venture and responsibility for appointment and dismissal of personnel. The officers may be Chinese or foreign persons.³⁸ The president and vice-president may not hold similar offices or participate in another economic organization within China. They may be dismissed at any time for dereliction of duty or for corruption.³⁹

Although board resolutions in China may be adopted by the percentage vote authorized in the articles of association, certain resolutions require unanimous approval, to wit: amendment of the articles of joint venture; termination or dissolution of the joint venture; increase or assignment of the registered capital of the joint venture; or merger of the joint venture with another economic organization.⁴⁰ Vietnam appears to mandate unanimity in a broader scope of business activities. Thus, it requires, in addition to the above, unanimity in the production and business plan of the joint venture, borrowing and budgetary matters, appointment, replacement and dismissal of the chairman of the board of management, the general director, any of the deputy general directors and other key personnel of the enterprise.⁴¹

Foreign Exchange Control

China and Vietnam have similar foreign exchange requirements. The joint venture must use the Bank of China or other designated bank which supervises all receipts and payments. All receipts and deposits must be made through the account. Foreign accounts may be permitted provided the State Administration of Exchange Control allows them. In such circumstances, they are subject to full disclosure of receipts, payments and bank account statements.⁴² Similarly, in Vietnam, all enterprises involving foreign owned capital must be deposited with the Bank of Foreign Trade of Vietnam or with branches of Vietnamese foreign or with foreign banks approved by the State Bank of Vietnam. All receipts and expenditures are to be effected through these accounts.⁴³ Like China, all foreign exchange must be converted into local currency for expenditures within Vietnam.⁴⁴

Both countries permit repatriation of profits after payment of taxes.⁴⁵ Loans for foreign exchange and for local currency may be applied for at the Bank of China in accordance with the Bank's regulations. Foreign exchange funds may be borrowed from abroad but a report must be made to the State Administration of Exchange Control.⁴⁶ Vietnam mandates that the enterprise have a balance between foreign currency receipts and expenditures, insuring, with some exceptions, that foreign currency receipts derived from exports and other sources are sufficient to meet foreign currency expenditures, including profits to be remitted abroad.⁴⁷

Taxation

The joint venture in China is taxed at the basic rate of 30%; 24% in coastal economic zones (Tianjin, Shanghai, Guangdong) and 15% in special economic zones (e.g. Human). Tax holidays are typically two years, 50% reduction for an additional 2-3 years plus investment incentives if capital is reinvested. The joint venture regulations merely recite the necessity of paying taxes in accordance with applicable laws. Imports by a joint venture are exempt from

customs duties and from the industrial and commercial consolidated tax with respect to machinery and equipment needed for construction of the factory site or are part of the investment or are used in production of goods for exports and are manufactured within China. Exports may be exempted from industrial and commercial consolidated tax by MOFERT. Exemption from taxation may be granted in the early phase of a joint venture.⁴⁸

In Vietnam, enterprises with foreign parties are subject to profits taxes consisting of: (1) priority category (Article 3 enterprises, i.e., implementing major economic programs, export oriented, use of high technology, building infrastructures and significant foreign currency producing services and meets certain other criteria)⁴⁹ - 15-20% of profits earned; (2) standard category - 21-25% of earned profits; tax holidays are permitted up to an initial period of two years from commencement of the first profit making year and a 50% reduction for the next two years.⁵⁰ A case by case exemption may be made by the State Committee for Co-operation and Investment upon recommendation of the Minister of Finance. Additional special financial incentives are also provided for in the Regulations.⁵¹ A withholding tax is to be paid by the foreign economic organization for profits transmitted abroad consisting of a 5% tax where the foreign organization contributed 70% of the prescribed capital or in excess of \$10 million; a 7% tax where the contribution was between 50-70% of the prescribed capital or in excess of \$5 million; and 10% tax in all other cases.⁵² If the foreign person reinvests any portion of the profits for a period of three years, then the tax thereon will be refunded. The taxable year is the calendar year but permission may be sought from the Ministry of Finance to alter the fiscal year.⁵³

Term, Dissolution and Liquidation

In China, the term of a joint venture is dependent upon the nature of the enterprise. Ordinarily, the period extends from 10 to 30 years. A joint venture involving a large investment, a long construction period and a low profit ratio or one in which advanced technology is given or is internationally competitive may extend to 50 or more years.⁵⁴ Vietnam's time limits are quite similar. The duration of the enterprise is the limit placed upon by the parties which, in principle, should not exceed 20 years. Like China, the same examples are used to justify extending the duration to 50 years.⁵⁵

Both countries again have almost identical provisions regarding renewal of the enterprise. In China, the parties must apply to the appropriate governmental agency at least six months before the proposed extension of the term. Vietnam clearly copied this provision, using almost identical wording. The application therein is to the State Committee for Co-operation and Investment.⁵⁶

In China, a joint venture may be dissolved: (1) upon expiration of the term of the joint venture; (2) due to major losses in the enterprise; (3) by failure of one of the parties to fulfill its obligations; (4) due to major losses by war, natural disaster or other force majeure; (5) by failure to achieve business objective without possibility for future development; or (6) the occurrence of a stipulated event.⁵⁷ Vietnam's regulations are again almost identical.⁵⁸ Both countries require notification to the appropriate governmental authorities. The wording of the Vietnamese regulations mirrors that of China. Both countries except expiration of term from

governmental notification and both explicitly state that the defaulting party must indemnify the other party for the losses sustained.⁵⁹

The dissolution procedure is similar. China requires the Board of Directors to propose liquidation procedures and submit its proposal and nominations to the governmental department which processes liquidations. The liquidation committee of the enterprise (members of the Board and/or attorneys, accountants) reviews the finances, collects assets and indebtedness, compiles an inventory and proposes a liquidation plan to the Board. The assets remaining are applied to the indebtedness and any remaining sums are divided pro-rata to the parties. Procedures are then taken to cancel the joint venture registration and turn in the business license.⁶⁰ Vietnam requires the Board of Management, no later than six months prior to termination of the enterprise or decision to end the venture, to accomplish the above. It is more explicit as to order of priorities of payment of the liabilities-salaries and insurance premiums have top priority followed by taxes and import duties, then loans and interest thereon and, finally, the remaining indebtedness. The liquidation committee submits the liquidation plan to the State Committee for Co-operation and Investment, which, after termination of the work of the liquidation committee, cancels the investment license and retains custody of the books of accounts of the venture.⁶¹

Dispute Resolution

China and Vietnam reflect the Asian approach, rooted in Confucianism, which abhors litigation. Again, both countries have very similar provisions for procedures to be followed in the event of a dispute between parties to the enterprise. They are to initially negotiate with each other and/or proceed by conciliation (generally, having a neutral person assist in resolving the dispute). If there is no resolution, an arbitration body shall make the determination. If arbitration is within the country, then it proceeds under the auspices of the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade or the Foreign Trade Arbitration Committee of Commerce and Industry of the Socialist Republic of Vietnam. The parties may agree to arbitrate outside of the country before other tribunal bodies. If no arbitration procedures are provided for, the People's courts of both countries may be utilized.⁶²

Wholly Owned Enterprises

China was initially very reluctant to allow wholly foreign-owned enterprises due to its long historical abuses by foreigners. Vietnam, although it had concluded its war with the U.S. and the government of South Vietnam in 1975, adopted China's opening to the West, including permission of 100% ownership of enterprises by foreigners. Vietnam's Foreign Investment statute sets forth three types of enterprises: a contractual business co-operation; joint venture enterprise; and a 100% foreign owned enterprise.⁶³ In China, a foreign company may establish a wholly-owned limited liability (to capital investment) subsidiary.⁶⁴ Generally, it must use advanced technology or export more than 50% of its product. The said percentage is subject to a downward modification depending upon the desirability of the enterprise. Generally, the advanced technology requirement poses few problems in negotiating with the government.⁶⁵

Vietnam permits the 100% foreign-owned enterprise to have a duration of up to 50 years. China allows the term of ownership to be 20-30 years which may extend up to 70 years for large properties or business.⁶⁶ The advantage of having a fully owned enterprise is that there is no Chinese or Vietnamese party but the advantage may be more than offset by the fact that the local party is not present to provide the contacts, assets and experience.

The procedure for setting up such an enterprise in China is similar to that of the joint venture. Application is made to the appropriate department under the State Council, which has 90 days to examine and decide whether or not to permit the enterprise. The foreign investor has to apply for a business license from the industry and commerce administration authorities for registration.⁶⁷ Upon registration the enterprise becomes a Chinese legal person. Investments within China must be made as previously stated in the application and approval. Major changes must be reported to the appropriate governmental agency.⁶⁸ The requirements concerning operation, labor agreements, unions, account and reporting taxes, banking, purchase of materials, remission of profits abroad, termination and liquidation are like those of joint ventures. Insurance coverage is to be applied for with Chinese insurance companies.⁶⁹

In Vietnam, the wholly owned enterprise by foreigners is fully responsible for its management and the results therefrom. It must be a limited liability company which is a Vietnamese legal entity subject to the laws of the host state.⁷⁰ The enterprise wishing to invest in this manner must file for an investment license to the State Committee for Co-operation and Investment which application is to include: (a) a feasibility study of the proposed investment which contains the economic and social benefits of the project; (b) the organization's charter; (c) assurances that the investor is qualified to embark on a long-term business in Vietnam; (d) the charter of the intended enterprise to be formed in Vietnam; and (e) the petition for preferential treatment, if any.⁷¹

The Vietnamese requirement for the charter of the enterprise is similar to that found in U.S. states, namely: the business name and address; description of the production and business plan with proposed timetable for investment; the amount of capital; duration; day-to-day management plan and name of the representative responsible for its implementation; financial details and accounting procedures; and details of dissolution conditions and procedure.⁷² The same procedure is used for governmental review and approval of the application for a license as for joint ventures. Upon approval, publication of the details of the license takes place within 30 days of the issuance thereof in a prescribed local and national governmental publication.⁷³ Amendments of the charter require governmental approval. A non-resident owner must have a local representative in Vietnam. In the event of a serious breach of law or deviation from the objectives of the enterprise may lead to the suspension of the license.⁷⁴

Protection of Intellectual Property Rights

The major Chinese statutes governing intellectual property rights were enacted between 1982 and 1990. The relevant statutes are the 1982 Trademark Law of the People's Republic of China,⁷⁵ the 1984 Patent Law of the People's Republic of China,⁷⁶ the 1990 Copyright Law of the People's Republic of China⁷⁷ and part of the 1986 General Principles of

the Civil Law of the People's Republic of China.⁷⁸ Vietnam also grants protection to intellectual property rights in principle. The relevant authority are the Ordinance on the Transfer of Foreign Technology into Vietnam,⁷⁹ Decree No. 49-HDBT⁸⁰ which provides guidance for implementation of the said ordinance, Regulations on the Purchase and Sale of the Right to Use Inventions, Utility Solutions, Industrial Designs, Trademarks on Goods and Technical Secrets,⁸¹ Ordinance on the Protection of Industrial Property Rights⁸² and Circular No. 03-NCPL of the Supreme People's Court Providing Guidance on the Resolution of Some Disputes over Industrial Property Rights.⁸³

Trademarks

China The P.R.C. has had a trademark protection statute since 1982. Prior to that time, it had "Regulations Governing Trademarks" which took effect on April 10, 1963. The Trademark Office is an administrative Office within the Department of Industry and Commerce under the State Council. In order to obtain a trademark, the applicant must be an enterprise, institution or an individual industrialist or businessman.⁸⁴ Foreigners and foreign enterprises may also apply for trademark protection within the P.R.C. They must do so through agents within the country.⁸⁵ A "trademark" is a work or design or combination thereof having distinctive characteristics so as to distinguish it to facilitate identification from other goods. The purpose of a trademark is to "encourage producers to guarantee the quality of their goods and safeguard the reputation of their trademarks, in order to protect the interests of consumers and promote the development of the economy."⁸⁶

The pharmaceutical and tobacco industries must use registered trademarks. Other persons may apply by filing in accordance with the particular classes of goods for which a trademark is sought.⁸⁷ Trademark holders are responsible for the quality of goods. Appropriate administrative governmental departments of industry and commerce are responsible for supervision over the quality of manufactured goods and are mandated to prevent deceptive practices to consumers.⁸⁸ Deceptive practices are subject to loss of trademark, imposition of fines, public notice of the deception (in Asia, this would constitute "loss of face" which is taken quite seriously), cease and desist orders and/or seizure of goods.⁸⁹ Infringement of trademarks makes the transgressor liable to an injunction order, compensatory damages to the holder of the trademark, fines and possible criminal liabilities.⁹⁰

The holder of a trademark is required to use appropriate Chinese characters for "Registered Trademark" and its "R" symbol. Trademarks may not have the following words or designs:

- names, flags, emblems or military flags or decorations of the P.R.C. or of foreign countries or of inter-governmental international organizations;
- "Red Cross" or "Red Crescent" symbols or names;
- generic names or designs of goods;
- those stating quality, major raw materials, function, use, weight, quality or other characteristic of the goods; exaggerated and deceptive advertising; and
- those detrimental to morality or prevailing customer or other undesirable influences.⁹¹

Foreigners seeking trademark protection must come from countries having reciprocal agreements with the P.R.C. and must appoint an agent approved by the government to act on its behalf with respect to the trademark registration.⁹² As in the case of patents, time is of the essence in registering for the trademark. A "Trademarks Register" in the Trademark Office is set for the entry of all approved trademarks.⁹³ Once the preliminary trademark is made public, those persons opposing its filing have three months to file objections. All trademark disputes must be submitted to the Trademark Review and Adjudication Board within one year of approval. The Board ultimately decides the validity of the trademark application.⁹⁴

The trademark, as well as all extensions, is valid for ten year intervals. If a trademark is assigned, both parties must apply to the Trademark Office and both of them must guarantee the quality of the goods to which the trademark is used. Trademark licensing contracts are to be filed with the Trademark Office.⁹⁵ A trademark may be revoked if not used for three consecutive years. Other causes for possible revocation include an improper assignment, changes of address and work or design without authorization.⁹⁶

If a trademark is infringed upon, criminal and civil penalties become available to the holder of the trademark. Use of identical or similar trademarks in connection with similar goods without a license or having a person's right to exclusivity of a registered trademark will cause a panoply of remedies to become applicable.⁹⁷

Vietnam. North Vietnam enacted its first intellectual property measures as early as 1958 (17 years before unification) by passage of laws regulating the registration of trademarks.⁹⁸ After unification, the Council of Ministers, in 1982, issued regulations for the registration of trademarks which were followed by regulations governing industrial designs in 1988. Other decrees and regulations followed in fairly rapid succession in an endeavor to entice foreign investment.⁹⁹

Vietnam is a signatory to the Paris Convention for the Protection of Industrial Property of March 20, 1883 (governing trademarks), the Madrid Agreement of April 14, 1891 and the Stockholm Convention of July 14, 1967 (the U.N. World Intellectual Property Organization).¹⁰⁰

The most significant enactment in the area of intellectual rights protection is the Decree on the Protection of Industrial Property Rights.¹⁰¹ The ordinance and decree give recognition and protection to industrial property rights to all state and private organizations and individuals.¹⁰² "Industrial property" is defined as including: (1) invention (new technical solution); (2) utility solution (application of prior patent in a new manner) (3) industrial design (new, world-wide external appearance of a product embodied by lines, three-dimensional forms, colors or combination thereof which is capable of serving as a pattern for an industrial or handicraft product; (4) trademark (a mark used to distinguish goods or services by a person from goods or services of another person; it may be in the form of words, pictures or combination thereof in one or more colors); and (5) appellation of origin (the geographical

name of a country or locality wherein the manufactured product originates entirely or in essence).¹⁰³

A caveat to be noted and which is common to both China and Vietnam: "Industrial property which is contrary to the social interest, public order, the principles of humanity or socialist morality shall not be protected."¹⁰⁴ The effect of such exception is unclear. Although the implications appear to give governmental authorities very broad powers to deny protection, the practical effect appears to be insignificant in light of the interpretation to date in China and Vietnam.

The governmental organizations having responsibility in the area of intellectual property protection are: the Council of Ministers which has overall supervision and which issues policies for promotion and development thereof; the State Committee for Science and Technology which is responsible for organization, supervision and implementation of State policies; the Inventions Department under the State Committee which promotes procedures for recognition of industrial property rights and cooperates with social organizations (e.g., the General Federation of Labor and the Communist Youth League) and inventors associations in this area; and a variety of ministries, state committees and other organizations under the Council of Ministers, and people's committees in the provinces and cities which are responsible for organization and development of industrial property within their jurisdiction.¹⁰⁵

The owner (as distinguished from the author or creator) has the exclusive right to use and transfer the protected object and may sue for infringement thereof. If it is transferred, it must be by means of a written agreement which is registered with the Inventions Department.¹⁰⁶ The right to use an invention, utility solution or industrial design includes the right to manufacture, import, advertise and place in circulation. With respect to trademarks or appellation of origin, the owner may exclusively use them on the products, advertising, packaging or on documents relative to the protected indicia.¹⁰⁷ The owner thereof is obligated to use the protected object and to pay the fees required by the government. The requirements reflect the European that protection is a privilege which may be lost if not used for the common benefit of the community.¹⁰⁸ There are provisions for compulsory licensing (with payment to the owner) by the Chairman of the State Committee for Science and Technology where the owner of the protected title has failed to utilize the object or when needed for vital reasons.¹⁰⁹

The protected object may be assigned by the owner. The author, as distinguished from the owner, has the right to be named in the protected title and in scientific and technical documents. Such person may have the right to receive remuneration in a sum fixed by the Council of Ministers.¹¹⁰

Infringement is the lack of consent by an owner to a person who uses the invention, utility solution or industrial design for manufacturing, importing, advertising or other usage of the protected object.¹¹¹ Vietnam, however, has fairly liberal exceptions to the prohibition. They included: (1) utilization of the object of industrial property for non-commercial purposes; (2) circulating products which were placed in the market by the owner of the protected title or by the prior manufacturers or licensees; and (3) the use of the protected industrial property in

transport vehicles of foreigners when the vehicles temporarily enter or are in Vietnam and provided that they are used solely for the operation of the vehicles.¹¹²

Patents

The Patent Law of the P.R.C. came into effect on April 1, 1985 and is similar in most respects to other national patent laws. It governs inventions, utility models and designs unless the "invention-creation" involves national security, is violative of state laws, is contrary to social morals or is detrimental to the public interest.¹¹³ The right is given to persons responsible for the invention, to the appropriate job until accomplished while primarily using the resources of the unit or to the enterprise or joint venture if made by a staff member or worker for the foreign-owned enterprise or venture.¹¹⁴

It is a "race to the register" right, i.e., as between two applicants, the first to file will be granted the patent.¹¹⁵ The right is assignable although there are restrictions if the patent right is owned by the government-owned work unit or the patent is being transferred by a Chinese person to a foreign person.¹¹⁶

Like the U.S. patent statute, it is necessary that the invention and utility models be novel, possess inventiveness and is practical. By "novel", it is meant that no other identical model was previously publicly disclosed in domestic or foreign publications, or was publicly used in China, otherwise made public or is one identical to a model previously filed and recorded in the Patent Office. "Inventiveness" means that the model has conspicuous and substantially distinguishing characteristics. "Practicability" means it must be capable of being manufactured or used and "is capable of producing positive results."¹¹⁷

Vietnam. Vietnam does not have a separate patent statute. The enactment cited above under trademarks is applicable herein.

Copyrights

China. The Copyright Law of the P.R.C. became effective on June 1, 1991. There were implementing regulations and regulations for the protection of computer software.¹¹⁸ The works covered include those of literature, art, natural and social sciences, engineering and technology. They may take place in a variety of formats such as a writing, oral works, musical and dramatic works, fine art, drawings, maps, computer software and other works.¹¹⁹ Excluded from protection are prohibited works (pornography) and works which "prejudice the public interest."¹²⁰ The subject matter must be original ("created") which means that it derives from intellectual activities from which literary, artistic and scientific works result. Like U.S. law, originality is not necessarily novel. An author may have derived all of his/her ideas from other authors. It is the unique mode of expression which is protected.¹²¹

A copyright gives the owner five basic rights with respect to the subject matter: the rights of publication, authority, alteration, integrity and exploitation (remuneration).¹²² Ordinarily, the copyright belongs to the person creating it (the author). If the work was derived

from the sponsorship of an entity (the joint venture etc.), then the entity is the author.¹²³ China grants authors unlimited time with respect to the rights of authorship, alteration and integrity of the work; however, the right to exploit the work, including remuneration is limited to the life of the author plus 50 years (50 years if the author is an entity).¹²⁴ Exceptions include the right to use the work for individual study; use of an insubstantial quotation; media use, translation of a few copies for teaching or scientific use; use by a governmental organization and several other restricted usages.¹²⁵

A person seeking to exploit a copyrighted work must receive permission in the form of a written contract with the owner, which contract specifies the manner of use, its exclusivity, scope and term of the license, liability for breach and other pertinent data. The term is limited to ten years but is renewable.¹²⁶ Civil liability includes a public apology, monetary damages and injunction. Governmental remedies include criminal charges, fines, confiscation and imprisonment.¹²⁷

Vietnam. There is substantial similarity to China's statute. The reason is that both countries adhere to international copyright treaties (the Berne and Universal Copyright Conventions). The works of Vietnamese authors and residents in Vietnam are protected. Similar moral rights (authorship, distortion and integrity) duration and transferability are given recognition. In both countries, it remains to be seen whether de facto protection is rendered. This author, when visiting Vietnam in January, 1995, found innumerable violations of copyright laws, especially in the reproduction without permission of artistic works (musical tapes and cds), computer software and other violations. It appears that China and Vietnam will respond to outside pressure when it serves their best interest to do so. Retaliatory measures by outside governments will eventually limit the violations.

CONCLUSION

China and Vietnam are the last remnants of communist states still in existence today. Communism remains as an ideology to the extent that no competing political ideologies or parties are permitted. Nevertheless, both states have de facto recognized that Marxist economics does not work. The demands of the marketplace have replaced planned economies. China was the first state to experiment and implement the changes within its society after a period of considerable turmoil. Vietnam, unable to sustain itself by the inherent demands of its ideology, has also incorporated market principles. In doing so, it clearly followed the Chinese model. It copied those laws and regulations which have proven successful within China. This paper has attempted to illustrate this thesis.

ENDNOTES

1. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 1 of the Chairman of the Standing Committee of the National People's Congress on July 4, 1979 effective as of January 1, 1980.

2. Article 1 of the statute.

3. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No.2 of the Chairman of the Standing Committee on July 4, 1979, effective as of January 1, 1980.

4. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 3 of the Chairman of the Standing Committee of the National People's Congress on July 5, 1979, effective January 1, 1980. The was amended on September 2, 1983, by decision of the Standing Committee of the Sixth National's People's Congress.

5. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 4 of the Chairman of the Standing Committee of the National People's Congress on July 5, 1979, effective as of January 1, 1980.

6. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 5 of the Chairman of the Standing Committee of the National People's Congress on July 6, 1979, effective as of January 1, 1980.

7. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 7 of the Chairman of the Standing Committee on July 7, 1979, effective as of January 1, 1980.

8. Adopted at the Second Session of the Fifth National People's Congress and promulgated by proclamation of the National People's Congress on July 1, 1979, effective as of January 1, 1980.

9. Adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 7 of the Chairman of the Standing Committee of the National People's Congress, effective as of July 8, 1979.

10. Enacted by the Eighth Legislature, Second Session of the National Assembly of the Socialist Republic of Vietnam, 29 December 1987 which statute was amended on 30 June 1990 and 23 December 1992. Vietnam is now open to U.S.investors with the announcement of President Clinton on July 11, 1995 that the United States has established full diplomatic relations with its former enemy. Nevertheless, importation of goods will not become a significant factor until the U.S. grants Vietnam most-favored-nation status as it presently has with China.

11. Article 1 of the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures and the preamble to Law on Foreign Investment in Vietnam, *op. cit.*

12. See Guha Roy, "Is the Law Responsibility of States for Injuries to Aliens a Part of the Universal Law," 55 A.J.I.L. 863. See, also, Resolutions 523 (VI) of January 12, 1952; 626 (VII) of December 21, 1952 and 1803 (XVII) of December 14, 1962 of the General Assembly of the United Nations which leave to the host state the compensation to foreign investors for expropriation or nationalization.

13. Article 3 of Vietnam's Law on Foreign Investment.

14. China's Joint-Venture statute, Article 4.

15. *Id.* at Article 1.

16. *Id.* at Articles 13-15.

17. Decree no. 28. HDBT of the Council of Ministers of the Socialist Ram, dated 6 February Republic of V17.ietnam, date 6 February, 1991, Decree Providing Regulations on Foreign Investment in Vietnam, Articles 21-23.

18. Compare China regulations, Article 14 with Article 24 of Vietnam's regulations.

19. China's Joint Venture statute, Article 14 and Regulations, Article 19. Vietnam's Regulations, Article 34.

20. Statute, Article 4.

21. Regulations, *supra*, Article 21.

22. *Id.* at Articles 22 and 24.

23. *Id.* at Article 23.

24. *Id.* at Article 23.

25. Vietnam's Joint Venture Regulations, Article 34.

26. Office of the State Committee for Co-operation and Investment, Legal Writings on Foreign Investment in Vietnam, footnote 18 to the "Law on Foreign Investment in Vietnam," p.15.

27. Article 8 of the Statute.

28. *Id.* at Articles 8-9.

29. China's Joint Venture statute, Article 14 and Regulations, Article 19.

30. See Article 7 which divides the contribution to prescribed capital into two parts: (1) the foreign party may contribute in foreign currency, plant and equipment and intellectual property rights and technical know-how and processes; and (2) the Vietnamese party may make its contribution in local currency, natural resources, right to use a site, plant and equipment and technical services and know-how.

31. China's Regulations, Article 21. Currency in China has been divided into two types: renminbi, which is the currency used by natives and foreign currency certificates which is the currency given to foreigners. Only the latter may be used to re-convert the currency to foreign currency.

32. Statute, Article 11.

33. Statute, Article 5.

34. Regulations, Article 27.

35. Statute, Article 6 and Regulations, Article 34. Vietnam-Regulations, Article 36.

36. Regulations, Article 35. Vietnam-Regulations, Articles 37-38.

37. Statute, Article 12.

38. Statute, Articles 38-40.

39. *Id.* at Articles 40-41.

40. Regulations, Article 36.

41. Regulations, Article 39.

42. Regulations, Articles 73-76.

43. Regulations, Article 82.

44. Compare China's Regulations, Article 26 with Vietnam's Regulations, Article 83.

45. Compare China's statute, Article 10 and Regulations, Article with Vietnam's Regulations, Article 85.

46. China's Regulations Article 78 and Interim Procedures for the Handling of Loans by the Bank of China to Chinese-Foreign Joint Ventures, promulgated by the State Council, effective July 26, 1980.

47. Vietnam, Regulations, Article 84.

48. Regulations, Articles 69-72.

49. Regulations 69. The additional criteria is the satisfaction of any two of the following: (1) the prescribed capital of the enterprise is under U.S. 10 million; (2) the technology enhances technological standards and production efficiency, is not detrimental to safety and makes rational use of resources and manpower; (3) the enterprises exports at least

80% of the products or derives such percentage in foreign currency; (4) the level of profits is less than average profits from other equivalent projects; (5) the project is located in a less than favorable area of the country; and (6) the investment is made no later than 28 December 1997.

50. *Id.*

51. See Articles 71-72.

52. Regulations, Article 73.

53. Regulations, Articles 74-75.

54. Regulations, Article 100 as revised by the State Council on January 15, 1989.

55. Regulations, Article 44.

56. Regulations, Article 46.

57. Statute, Article 102 and Regulations, Articles 12-13.

58. See Article 47.

59. China's Regulations, Article 102 and Vietnam's Regulations, Article 47.

60. Regulations, Articles 100-108.

61. Regulations, Articles 51-53.

62. In China, see Regulations, Articles 109-112 and Statute, Article 14. In Vietnam, see Regulations, Article 53.

63. Article 4 of the Foreign Investment Law.

64. Law of the People's Republic of China on Foreign-Capital Enterprises, adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 39 of the President of the People's Republic of China, effective April 12, 1986. "Foreign" enterprises are established within China by foreign investors using their capital exclusively.

65. Regulations, Article 3.

66. Article 15 of Vietnam's Foreign Investment Law.

67. *Id.* at Articles 6-7.

68. *Id.* at Articles 8-19.

69. *Id.* at Articles 11-23.
70. Article 55 of the implementing regulations.
71. *Id.* at 57 of the Regulations.
72. Article 58 of the Regulations.
73. Article 59 of the Regulations.
74. Articles 60-62 of the Regulations.
75. Adopted at the 24th Meeting of the Standing Committee of the Fifth National People's Congress and promulgated by Order No. 10 of the Standing Committee of the National People's Congress on August 23, 1982, effective as of March 3, 1983.
76. Adopted at the Fourth Meeting of the Standing Committee of the Sixth National People's Congress and promulgated by Order No. 11 of the President of the People's Republic of China on March 12, 1984, effective April 1, 1985.
77. Adopted at the 15th Meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990 and promulgated by Order No. 31 of the President of the People's Republic of China on September 7, 1990, effective June 1, 1991.
78. Adopted at the Fourth Session of the Sixth National People's Congress and promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, effective January 1, 1987.
79. 5 December 1988
80. 4 March 1991
81. Issued in conjunction with Decree No. 201-HDBT dated 28 December 1988 of the Council of Ministers.
82. 28 January 1989.
83. 22 July 1989.
84. Trademark Law, Articles 2-4 and Trademark Regulations, Article 2.
85. Regulations, Articles 30-31.
86. Trademark statute, "Article 1."
87. Trademark Regulations, Articles 3-4.

88. Trademark statute, Article 6.
89. Trademark law, Articles 31-34 and Regulations, Articles 20-23.
90. Trademark statute, Articles 37-40 and Regulations, Articles 24-26.
91. Trademark statute, Articles 7-8 and Regulations, Article 8.
92. Trademark statute, Articles 9-10.
93. Trademark statute, Article 18, and Regulations, Articles 5-6.
94. Trademark statute, Articles 19, 22, 27-29 and Regulations, Article 11.
95. Trademark statute, Articles 24-26.
96. Trademark statute, Article 30. Compare U.S.C.A. section 1052.
97. Trademark statute, Articles 30-39. Article 127 of the Criminal Law which applies both to patent and trademark law violations, provides for up to a fixed-term imprisonment of not more than three years, criminal detention or a fine.
98. Arrete No. 175/TTG, 3 April 1958. For a brief historical introduction and discussion of the current status of intellectual property laws, see Sesto E. Vecchi and Michael J. Scown, "Vietnam: Intellectual Property Rights Protection," *IP Asia*, 27 July 1992, pgs. 2-9.
99. See Regulations for the Protection of Industrial Designs, No. 85/HDBT 13 May 1988; Ordinance on the Transfer of Foreign Technology into Vietnam, 5 December, 1988; Regulations governing Utility Solutions, No. 200/HDBT, 28 December 1988; Decree No. 201/HDBT 28 December 1988 on issuance of the Regulations on the Trading of Licensing of Patents Utility Solutions, Industrial Design, Trademark and Know-How; Ordinance on Industrial Protection, 28 January 1989; Decree No. 49/HDBT 4 March 1991 providing detailed stipulations on the Implementation of the Ordinance on the Transfer of Foreign Technology into Vietnam; Ordinance Protecting Industrial Property Rights, Order No. 13/LCT/HDNN, 11 February 1991, Arrete No. 84/HDBT, 20 March 1990 and Circular No. 3/NCPL, 22 July 1989; and Ordinance on the Quality of Goods, 1 July 1991.
100. See Vecchi, *op. cit.*, p. 3.
101. No. 13 LCT/HDNN8, 11 February 1989. The discussion in the article arises out of the Ordinance on the Protection of Industrial Property Rights, issued by the State Council, 28 January 1989.
102. Article 1 of the Ordinance. All citations concerning protection of industrial property rights are to the Ordinance of 28 January 1989.

103. Article 4.
104. Article 4(5). Compare China's similar prohibition in its Patent Law, Articles 4-5.
105. Article 5.
106. Articles 9-10.
107. Article 11.
108. *Id.* at Article 13.
109. *Id.* at Article 14.
110. *Id.* at Articles 16-17.
111. Articles 9-12 of the Ordinance on the Protection of Industrial Property Rights.
112. *Id.* at Article 12.
113. Patent statute, Articles 4-5. An "invention" is any new technical solution relating to a product or a process or the improvement thereof. A "utility model" refers to any new technical solution relating to the shape or structure or combination thereof of a product fit for practical use. An "industrial design" is "any new design of the shape, pattern or color or their combination, of a product that creates an aesthetic feeling and is fit for industrial application." Rules for the Implementation of the Patent Law of the People's Republic of China, approved by the State Council and promulgated by the Patent Office of the P.R.C. on January 19, 1985. Compare U.S. Patent Act, Section 101: "Whoever invents or discovers any new or useful process, machine, manufacture..."
114. Patent statute, Articles 6-8.
115. Patent law, Article 9., Article 5 of the Regulations provides that the postmark date will be the filing date if sent within China or if not legible, the date of receipt by the Patent Office will apply unless the applicant can prove an earlier date. Compare, U.S.C.A., Section 101. The patentee must be the original inventor of the object which was not previously known or discovered. Bockman Instruments v. Chemtronics Inc., C.A. Tel. 1979, 439 F. 2d 1369, on remand 328 F. Supp. 1132.
116. Patent statute, Article 10. Compare U.S.C.A., section 261.
117. Patent statute, Article 22.
118. Copyright Law of the People's Republic of China, adopted at the 15th meeting of the Standing Committee of the Seventh National People's Congress on September 7, 1990,

promulgated by Order No. 31 of the President of the People's Republic of China on September 7, 1990, effective June 1, 1991.

119. *Id.* Article 3. Compare U.S. Copyright Law, 17 U.S.C.A. Sec. 102(a).
120. Statute, Article 4.
121. See Zheng Chengsi and Michael Pendleton, Copyright Law in China (North Ryde, Australia: CCH International, 1991) p.2.
122. Statute, Article 10.
123. *Id.* at Article 11.
124. *Id.* at Articles 21-22.
125. *Id.* at Article 22.
126. *Id.* at Articles 23-24.
127. *Id.* at Articles 45-50. Compare 17 U.S.C.A. Sec. 502(a).